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Backgrounder

The 1987 Constitutional Accord

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THE 1987 CONSTITUTIONAL ACCORD

INTRODUCTION

On Wednesday, 3 June 1987, the Prime Minister of Canada and the 10 provincial premiers unanimously agreed on certain constitutional amendments. The 1987 Constitutional Accord embodies the agreement in principle achieved at Meech Lake in April 1987. The impetus for that meeting was the desire to obtain Quebec's acceptance of the Constitution Act, 1982, which, although binding on the province, had never been signed by it. The meeting was based essentially on the five conditions put forward by the Government of Quebec as prerequisites for the province to become a party to the Constitution,(1) although other provinces also brought particular concerns to the negotiations.

The 1987 Constitutional Accord must be approved by both Houses of Parliament and the legislatures of all the provinces before it will be proclaimed in force. Although there may still be some changes, it is useful at this point to offer some preliminary observations on the components of the Accord and raise possible issues.

CANADIAN CHARACTER AND QUEBEC'S DISTINCT IDENTITY

The first ministers agreed to recognize that "the existence of French-speaking Canadians, centred in Quebec but also present elsewhere in Canada, and English-speaking Canadians, concentrated outside Quebec but

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(1) See Library of Parliament Mini-Review No. 86-20 "Quebec's Constitutional Proposals, 1986".

also present in Quebec, constitutes a fundamental characteristic of Canada" and that "Quebec constitutes within Canada a distinct society." The Accord imposes on Parliament and the provincial legislatures (including Quebec) a commitment to preserving the fundamental characteristic of Canada, and on the legislature and Government of Quebec a commitment to preserving and promoting the "distinct identity" of Quebec.

This provision will be inserted in the body of the Constitution, not in the preamble as originally suggested. It goes beyond being a mere aid to constitutional interpretation: action contrary to these provisions could presumably be challenged. Interestingly, while all provinces (including Quebec) are to "preserve" the fundamental characteristic of Canada, Quebec is not only to "preserve", but also to "promote" its distinct identity, which connotes a positive onus, and is thereby more open-ended. It is also interesting that the English version of the text says that the roles of Parliament and provincial legislatures and of the legislature and Government of Quebec with regard to the fundamental characteristic of Canada and the distinct identity of Quebec respectively are "affirmed," which implies that a pre-existing condition or obligation is merely being continued. In the French version, however, the word "affirmed" is not used, suggesting that these are "new" roles to be fulfilled by Parliament, provincial legislatures and the Government of Quebec. This discrepancy in the English and French versions of the text could prove significant. Finally, it is noteworthy that with regard to the fundamental characteristic of Canada, the commitment is cast upon "Parliament and the provincial legislatures" (including Quebec), as compared to "the legislature and Government of Quebec" in the case of the distinct identity of Quebec.

The effect of such a provision in the Constitution is far from clear. It has been argued that the recognition of Quebec as a distinct society could be used to defend laws that might otherwise be seen as contravening the Charter of Rights and Freedoms - in particular, language, legislation in the Province of Quebec. The wording of the Accord

attempts to make clear that Quebec is not only French or the rest of the country only English, and this could work to the advantage of Francophones outside Quebec and Anglophones in Quebec. Nowhere, however, is the distinctiveness of Quebec society defined: does it result from the fact that Quebec is the homeland and centre of French Canada - or from the fact that the province has a French-speaking majority, with a substantial English minority?

Some of these concerns may have been addressed by the inclusion of a clause that states that nothing in the section derogates from the powers, rights or privileges of Parliament or the Government of Canada, or of the legislatures or governments of the provinces, including any powers, rights or privileges relating to language. In addition, it is expressly provided that the section does not affect existing constitutional rights dealing with multiculturalism and the aboriginal peoples.

SENATE

The Accord contains a provision regarding vacancies in the Senate of Canada: the federal government is to appoint persons acceptable to itself from lists of candidates provided by provinces where vacancies occur. This is a major change from the current procedure of appointing Senators, whereby Senators are "summoned" by the Governor General, which in effect means that such appointments are made by the Prime Minister. The new procedure is to apply until there are constitutional amendments regarding the Senate generally.

The principal difficulties would involve finding mutually-acceptable candidates, particularly in cases of regional or philosophical differences. It is unclear what would happen if a particular province (such as one with a separatist government) refused to submit a list of candidates. Similarly, there is no requirement that the federal government must fill a vacancy: in case of disagreement, the seat could be

left unfilled. In any event, the potential exists for Senators to be more closely identified with particular provinces or regions of the country.

Although the Constitution provides that the Yukon Territory and the Northwest Territories are entitled to be represented in the Senate by one member each, the Accord does not give their governments the right to submit a list of candidates.

IMMIGRATION

The Accord provides that the federal government negotiate an agreement on immigration and the temporary admission of aliens appropriate to the needs and circumstances of a province that so requests, and that, once concluded, the agreement has the force of law from the time it is declared. Thus, the negotiation of an agreement is mandatory if a province requests it, although this does not mean that an agreement will be concluded. Such agreements, however, are subject to the federal government's power to set national standards and objectives relating to immigration, including such things as determining general classes of immigrants, establishing overall levels of immigration, and prescribing categories of inadmissable persons. Any agreement is also subject to the Canadian Charter of Rights and Freedoms.

The first ministers also agreed that the first agreement will be with Quebec and will incorporate the principles of the 1978 Cullen-Couture agreement. Quebec will receive a number of immigrants proportionate to its share of the population of Canada, "with a right to exceed that figure by five per cent for demographic reasons." The federal government will no longer provide reception and integration services in Quebec but will give "reasonable compensation" to the province to provide them.

Other provinces have not shown the same interest as Quebec in becoming involved with immigration, although the enactment of this provision may encourage them to do so. Any such agreement, must be authorized by resolutions of Parliament and the provincial legislative concerned, and the same procedure applies to amendments unless otherwise

specified. The sections of the Constitution dealing with federal-provincial immigration agreements are subject to the general amending formula but those provinces who are parties to such agreements must agree to any amendment.

How effective will this provision be? Even if the federal government were to agree to "guarantee" a certain number or percentage of immigrants to a particular province, legally there is nothing to stop such people from moving: section 6 of the Canadian Charter of Rights and Freedoms contains a guarantee of certain mobility rights. Moreover, current legislation does not permit immigration authorities to dictate where immigrants go. Problems could arise if Quebec were to have poor reception or integration services, or to pass legislation making the province unattractive to immigrants. It should be noted that the reception and integration services to be provided by Quebec (or other provinces) for new immigrants would not seem to be subject to any federal standards, or supervision.

If the level of immigrants in a particular year fell below the guaranteed amount, what remedy or recourse would the province have against the federal government? Also unclear is whether the percentage share for Quebec would be a minimum or not: if more immigrants wanted to go to Quebec, would they be allowed to do so?

SUPREME COURT OF CANADA

The 1987 Constitutional Accord provides that the Supreme Court of Canada is to be entrenched in the Constitution, and that at least three of the nine justices of the Court are to be appointed from Quebec. In addition, where there is a vacancy on the Supreme Court, the federal government shall appoint a person acceptable to itself from the list of candidates proposed by the provinces.

Concerns over the Supreme Court stem from the fact that, although it is the final adjudicator of provincial laws and often decides federal-provincial jurisdictional disputes, its members are appointed solely by the federal cabinet. The Quebec government, while favouring

reform of the Supreme Court generally, feels that in the short-term it is essential that the Constitution recognize Quebec's right to participate in the selection of judges from Quebec.

Vacancies from Quebec are to be filled from lists provided by that province; all other vacancies are to be filled by lists submitted by the other nine provinces. Except for Quebec, there is to be no specific geographical or regional requirement for Supreme Court appointments; thus, theoretically, there need be no justices from Ontario. This could create problems where regions composed of more than one province are traditionally represented on the Court by a certain number of judges: for example, how are the nominees of all the western provinces to be assessed in case of a single vacancy? It should also be noted that the provision for three judges from Quebec is only a minimum.

There could be problems or delays if the provinces refused to submit names. Moreover, if the federal government found none of the candidates acceptable, it could not make any appointment, as it cannot appoint anyone whose name is not submitted by a province.

A more substantive question is how the new procedure will affect the future of the Supreme Court. It implies that individual justices are on the Court as the representatives of particular regions or provinces, a concept always rejected in the past. This may be preferable to the current unilateral appointments by the federal Governor-in-Council, but will not necessarily ensure that the most qualified people are appointed to the Court.

Although constitutional amendments regarding the Supreme Court are to require unanimous provincial consent, Parliament retains its powers to pass other laws relating to the Supreme Court except where they are inconsistent with these new provisions.

NATIONAL SHARED-COST PROGRAMS

One of the most contentious provisions of the 1987 Constitutional Accord reads as follows:

> 106A.(1) The Government of Canada shall provide reasonable compensation to the government of a province

> that chooses not to participate in a national shared-cost program that is established by the Government of Canada after the coming into force of this section in an area of exclusive provincial jurisdiction, if the province carries on a program or initiative that is compatible with the national objectives.

The federal government has substantial and relatively unlimited sources of revenue, but, because of the legislative division of powers in the Constitution Act, 1867, it is restricted as to the areas in which it can enact laws and programs. Since the 1930s, an elaborate system of federal-provincial fiscal agreements has been implemented and developed in connection with levying and collection of taxes, the funding of programs such as health and education, and regional equalization.

There has been considerable resentment at the provincial level over the federal government's spending power, and, specifically, its use of "conditional grants" and shared-cost programs; this is seen as giving Ottawa a lever to dictate and impose conditions on provincial spending priorities and use of transfer payments. As such, the federal government is perceived, especially by Quebec, as indirectly altering the legislative division of powers, and intruding on areas of exclusive provincial jurisdiction.

Ideally, from the Quebec government's point of view, the federal government would remove itself from areas outside its jurisdiction, while still transferring financial resources to the provinces. Such an arrangement, however, would necessitate a fundamental realignment of legislative powers, which is neither practicable or likely in the short-term. Accordingly, Quebec advocated restricting the federal spending power by means of a constitutional amendment requiring provincial approval of new federal programs involving conditional subsidies, and a restriction on the nature of the conditions that could be imposed on the provinces for shared-cost programs.

Prior to the Meech Lake meeting, it was reported that the federal government was proposing to allow provinces to opt out of new national programs in education or culture and receive reasonable compensation provided that the provincial programs met national standards. In addition, it was proposed that Ottawa would be constitutionally

prohibited from inaugurating any new shared-cost programs outside its jurisdiction and administered by the provinces, unless it had the approval of seven provinces with at least 50% of the population. It was also suggested that once a new program started, the federal government would be prohibited from backing out or reducing its contribution without provincial agreement.

The provision contained in the 1987 Constitutional Accord is substantially different. First, there appears to be no requirement for provincial consultation or approval prior to the institution of new programs: the federal government could presumably move unilaterally, or with the support of a minimum of provinces and/or population. Ottawa could, therefore, still influence provincial priorities. In addition, there is nothing to prevent the federal government from reducing or eliminating its contribution.

A few aspects of the "opting out" provision should be emphasized. First, it applies only to any "a national shared-cost program that is established ... after the coming into force of this section," and not to any extension of existing programs. (It is unclear whether a dental insurance plan would be considered a new program or an extension of Medicare.) Second, it applies only to programs in areas of "exclusive provincial jurisdiction," and thus not to areas of joint or overlapping federal and provincial jurisdiction, such as fisheries.

As well, a province can opt out only it it "undertakes its own program or initiative that is compatible with the national objectives." The distinction between an "initiative" and "program" is unclear. There is also a great deal of uncertainty over the meaning of "compatible," which does not seem to imply that the initiative or programs must be identical or similar, and may even suggest that so long as they are not conflicting, they could qualify.

Doubt also exists over the interpretation of "the national objectives." The section dealing with immigration refers to "national standards and objectives"; the absence of the word "standards" in the section on shared-cost programs has led some commentators to suggest that there will be room for a variety of standards as long as the same

objectives are maintained. It is still not entirely clear who is to determine the "national objectives" for shared-cost programs, and what role the courts will play. Some commentators have argued that the constitutional text makes clearer than did the Meech Lake Accord that national objectives are to be set by the federal government.

There will also likely be controversy here as elsewhere over what constitutes "reasonable compensation." Another issue left unanswered by the Accord is whether provinces would be able to opt out only at the time a future national shared-cost program is instituted, or whether they would be able to withdraw subsequently as well.

Constitutional scholars are divided over the effect of this provision, as well as its desirability. Some have argued that it would result in a "checkerboard" of programs, and that the federal government would become merely an agency distributing funds. Some feel that it entrenches and enhances federal powers, while others feel that it constitutes an effective limit on the federal spending power and would enhance provincial autonomy while maintaining minimum national standards. To address some of these concerns, the first ministers have specifically provided that nothing in the section "extends the legislative powers of the Parliament of Canada or of the legislatures of the provinces."

AMENDING FORMULA

The Constitutional Accord provides that "reasonable compensation" will be paid by the federal government when a province opts out of an amendment transferring provincial jurisdiction to Parliament. This is a change from the existing section 40, which provides for compensation to be given only in cases that involve the transfer of "provincial legislative powers relating to education or other cultural matters from the provincial legislatures to Parliament." The deletion of this limitation makes the scope of the new provision much broader.

The possibility that matters of provincial jurisdiction will be transferred to the federal government appears to be relatively remote at present, although a fundamental realignment of legislative powers between the two levels of government is conceivable. No provision, however, is made for financial compensation of the federal government in the event that matters of federal jurisdiction are transferred to some provinces but not others.

Certain matters in the Constitution currently require the unanimous consent of Parliament and all the provincial legislatures.(2) The Accord proposes to add to this list certain other matters, on the basis that it is not possible to opt out of them. These consist of:

(a) the powers of the Senate and the method of selecting Senators;

(b) the number of members by which a province is entitled to be represented in the Senate and the residence qualifications of Senators;

(c) the principle of proportionate representation of the provinces in the House of Commons prescribed by the Constitution of Canada;

(d) the Supreme Court of Canada;

(e) the extension of existing provinces into the territories; and

(f) notwithstanding any other law or practice, the establishment of new provinces.

Amendments to these issues, therefore, will be more difficult than at present. The most contentious are those relating to the powers of the Senate and the method of selecting Senators, and the creation of new provinces.

FIRST MINISTERS' CONFERENCES

The Accord includes a constitutional requirement that a first ministers' conference on the Constitution be held not less than once

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(2) See Constitution Act, 1982, section 41.

each year, the first to be held no later than the end of 1988. The agenda is to be entrenched in the Constitution and includes Senate reform (its role and functions, its powers, the method of selection of Senators and representation in the Senate) and roles and responsibilities in relation to fisheries, as well as "such other matters as are agreed upon."

As illustrated by the Constitution Act, 1982 provisions for constitutional conferences on aboriginal rights, the inclusion of the requirement for such meetings does not mean that any agreements will be reached. Even if they are, they would have to be subject to the applicable amending procedure. It should be noted that, unless agreed to by the first ministers, there will be no provision in the Constitution for discussion of matters relating to the aboriginal peoples of Canada, or for participation at future conferences by representatives of the native peoples or of the governments of the territories.

The Accord also entrenches in the Constitution the annual first ministers' conference on the economy. Besides the state of the Canadian economy, they may discuss "such other matters as may be appropriate." This represents the institutionalization of such conferences.